2010 WL 2865141 (Mass.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Massachusetts.
Suffolk County

Elizabeth RIVAS, Plaintiff,

v.

CHELSEA MOUSING AUTHORITY, Defendant.

No. SUCV2009-04692-B.
January 4, 2010.

Plaintiff's Motion for Judgment on the Peadings

Joshua N. Garick, Esq. (BBO #674603), jgarick@gmail.com, Stephen Callahan, Esq. (BBO #070460), scallaha@suffolk.edu, Suffolk University Legal Services, 350 Broadway, Chelsea, MA 02150, (617) 884-7568.

NOW COMES the Plaintiff Elizabeth Rivas ("Rivas") who moves pursuant to Mass. R. Civ. P. 12(c) for Judgment on the Pleadings. Rivas seeks judicial review of the final decision of the Defendant, Chelsea Housing Authority ("CHA"), terminating her rental subsides under the Massachusetts Rental Voucher Program ("MRVP"). The CHA terminated Rivas' eligibility because she was one of three people to provide temporary housing to her homeless mother while her mother awaited a decision from the CHA on her own application for housing. At all relevant times, Rivas has fully complied with the express terms of her MVRP voucher. As a result, Rivas seeks judicial review pursuant to G.L. c. 30A § 14, or in the alternative G.L. c. 249 § 4, requesting this Honorable Court reverse the termination insofar as it was (a) in violation of constitutional provisions; (b) based upon errors of law; (c) made upon unlawful procedure; and (d) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

Rivas submits herewith her Memorandum of Law.

Request for Oral Argument

Pursuant to Superior Court Rule 9A(c)(2), Plaintiff Elizabeth Rivas respectfully requests a hearing on the within Motion.

Dated: January 4, 2010

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PEADINGS

INTRODUCTION

The Plaintiff Elizabeth Rivas ("Rivas") seeks judicial review of the final decision of the Defendant, Chelsea Housing Authority ("CHA"), terminating her rental subsides under the Massachusetts Rental Voucher Program ("MRVP"). The CHA terminated Rivas' eligibility because she was one of three people to provide temporary housing to her homeless mother while her mother awaited a decision from the CHA on her own application for housing. At all relevant times, Rivas has fully complied with the express terms of her MVRP voucher. As a result, Rivas seeks judicial review pursuant to G.L. c. 30A § 14, or in the alternative G.L. c. 249 § 4, requesting this Honorable Court reverse the termination insofar as it was (a) in violation of constitutional provisions; (b) based upon errors of law; (c) made upon unlawful procedure; and (d) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

STATEMENT OF FACTS

Rivas has long been a participant of the MRVP in good standing. (TR 15).[1] She is indigent and suffers from both physical and mental disabilities. (RA 31). She is the recipient of a project-based voucher good only at 12 Fourth Street, Apartment 4, Chelsea, Massachusetts ("Premises"). (RA 9). This voucher is the only way Rivas and her five children can afford housing. (RA 8). On July 9, 2009, the CHA informed Rivas that her voucher was being terminated because she failed to report that she temporarily housed Ana Burgos ("Burgos"), her homeless mother, while Burgos' application for public housing was being considered by the CHA. (RA 6).

The Massachusetts Rental Voucher Program

The MRVP is a state funded rental assistance program overseen by the Massachusetts Department of Housing and Community Development ("DHCD"). The DHCD allocates funds to local housing authorities such as the CHA to provide rental vouchers to indigent members of the community. The voucher holder is required to pay the landlord 30% of the household's net income, and the CHA directly pays the landlord the difference between the participant's contribution and the market rental price. (RA 9). These contributions are subject to change if the household income changes. *Id.*

Once the participant becomes eligible for a voucher, there are only a few ways a housing authority may take it away. So long as the participant lawfully resides on the premises and remains financially eligible for rental assistance, the voucher will not expire. *Id.* Similarly, a participant's receipt of program benefits may not be terminated unless (1) the participant violates the express obligations set forth in the voucher, (2) the participant fails to honor a repayment agreement with the housing authority;[2] or (3) the participant commits fraud or makes any false statements to the local housing authority. *Id.*

The CHA's Allegations

The CHA hypothesized that Rivas violated the express obligations set forth in the voucher, namely paragraph 3(A)(1), because she did not "report a change in the household income and/or household composition to the [CHA] within 30 days of the change." (RA 6). Rivas concedes that she temporarily housed Burgos while she was transitioning from Virginia to Massachusetts. (TR 14). Rivas simply did what any person would do under the circumstances -- she provided temporary housing, out of necessity, to her homeless mother. (RA 14). It was anticipated that Burgos would only need to be accommodated for a few weeks while she was awaiting approval for public housing; however due to several misunderstandings (discussed more fully below), it took Burgos' application over a year to be processed and approved. (TR 6, 7, 10). During this extended delay, Rivas provided a roof for her mother, while going out of her way to ensure compliance with her voucher. (RA 14). Specifically, she only let her mother stay at her home as a guest for periods of approximately two weeks at a time; thereafter Burgos would reside with her other daughters Ivette Rivas and Aurea Rivas. (TR 11; RA 28, 29, 30 and 32).[3] Based on these arrangements, Rivas was under the impression that Burgos was a guest - not a household occupant. (TR 11). Since there was no change in household composition, Rivas was under no duty to report a change to the CHA. (RA 9). Nevertheless, the CHA relies on its own interpretation of the voucher's terms to suggest that any guest who inhabits the premises for more than 21 days in a calendar year is a household occupant. (TR 16-17). This interpretation is not expressly stated in the voucher, the controlling contract between Rivas and the CHA. (RA 9).

Ana Burgos' Housing Application

Burgos' application for public housing took an unusually long time to process. (TR 7) Ordinarily, an **elderly** candidate would be approved in approximately one month. *Id.* Nevertheless it took the CHA fourteen months to finalize Burgos' application because the CHA claimed that they did not receive an application. (TR 10). Compounding the problem, Burgos does not speak

English and had difficulties understanding CHA representatives throughout the entire process. (TR 3). This presented several problems, including: (1) a lost application (TR 10-11); (2) unanswered phone calls and unreturned messages (TR 11, 19); (3) the CHA's refusal to accept income verification from the Social Security Administration (TR 11); (4) the CHA's refusal to discuss the matter with those assisting Burgos (TR 19); and (5) the CHA telling Burgos that the process would take between six months and a year. (TR 11).[4] Burgos went through all the motions someone would go through if they had filed an application and she had no reason to believe her application was not received. *Id.* In the interim, she sought temporary shelter with her family members, including Rivas. *Id.* In March or April of 2009, Burgos was finally able to discern that the CHA did not have her initial application, and she filed a second application. (RA 10-12). This second application was approved within a month. (TA 7).

One aspect of the application was a five year history of Burgos' prior residences. (RA 10-12). In support of this history, Rivas notified the CHA of Burgos' temporary living arrangements by providing a signed letter to the CHA dated June 3, 2009 which stated:

> I Elizabeth Rivas daughter of Ana Burgos cannot have her staying here cause I have housing. She's been staying with me for only two weeks out of the month and staying with my sister Ivette Rivas for one week and staying with my other sister Aurea Rivas for one week also. If any question please call me at 857-277-2960. Thank you.

(RA 14). Rivas' two sisters also provided letters stating that they provided temporary housing to their mother. (RA 13, 15). The next day, the CHA through its resident selector, Ineudira Barbosa ("Barbosa"), notified Burgos that Rivas' letter was insufficient. (TR 14; RA 16). To assist Burgos, Barbosa provided a template of an acceptable letter for Rivas' brother and said she needed another just like it from Rivas. This template read:

> I Frankie Rivas certify that [Name] lived with me at [Address] from [Month and Year] to [Month and Year]. She was not obligated to pay rent. She did pay for her own food and expenses. *Has to be Notarized.

(RA 17). With the template in hand, Rivas provided the CHA with a second letter dated June 16, 2009 (thirteen days after sending the first letter) which did not deviate from the CHA's template whatsoever. It stated:

> I Elizabeth Rivas certify that Ana Burgos lived with me at 12 Fourth Street #4 Chelsea from July 2009 to the present. She was not obligated to pay rent. She did pay for her own food and expenses.

(RA 19). It was signed and notarized per the CHA's request. Id. This was another misunderstanding caused by the language barrier. Burgos told Rivas what she believed the CHA wanted her to do. Burgos believed that the CHA's request for a second letter was simply a formality. (TR 14). To this end, neither Rivas nor Burgos had reason to believe that the second letter would be used to establish Burgos' permanent address over the previous year (as opposed to a mailing address or homeless address). *Id.* Had Rivas known (1) that her first letter would be completely disregarded because it wasn't notarized;[5] (2) that she could have altered the language in the template or have the first letter notarized; and (3) that the second letter would be used to show permanent residency, she never would have submitted a letter in the form requested. *Id.*

CHA Terminates Rivas' Voucher

Based, in part, on the second letter, Rivas was notified that her voucher would be terminated for failing to report Burgos as a permanent resident of the household. (RA 6). This was promptly grieved. (RA 5). The grievance process envisions an informal settlement conference, a hearing and a decision by a grievance panel, and review of the panel's decision by the CHA's Board of Commissioners. *See* 760 C.M.R. § 6.08. Rivas was never afforded an informal settlement conference. After a hearing, the grievance panel voted to uphold the decision to terminate Rivas' voucher. (RA 3). In the decision, there are no findings of fact;

there is no discussion of Rivas' testimony and evidence, or other indication that Rivas' testimony (including the testimony of her witnesses) was considered by the panel; there is no discussion of the panel's conclusions of law; and there is no discussion of the factual and legal disagreements presented at the hearing. *Id.* This decision was affirmed by the CHA Board of Commissioners, again without discussion of the evidence, findings of fact and conclusions of law. (RA 1). Rivas timely filed this instant action for judicial review.

ARGUMENT

I. THE CHA'S DEFINITION OF HOUSEHOLD OCCUPANT FINDS NO SUPPORT IN THE VOUCHER, APPLICABLE STATUTES OR DHCD REGULATIONS

In the absence of an express provision in the voucher which limits a participant's conduct, a participant enjoys all lawful tenancy rights that any tenant would enjoy if renting in the open market. This includes the right to have guests. Since the MRVP program conditions continued payment of rental subsidies on compliance with program regulations, it is vital that the voucher clearly articulate behavior which, if violated, would result in termination. The voucher, however, does not indicate when a guest becomes a household member, thus triggering the participant's duty to inform the housing authority. The voucher merely states:

> "The Voucher holder must at a minimum report changes in household income and/or household composition to the [CHA] within 30 days of the change. If such changes alter the authorized unit size or rent share payment an amendment to the terms of this Voucher document will be executed."

(RA 9). The CHA claims that a guest becomes a household occupant (thus altering the household composition) if they reside on the premises for more than 21 days in a calendar year. This definition, however, is not contained anywhere in the voucher (the controlling contract between the parties), pertinent statutes, DHCD regulations or applicable case law. *See* G. L. c. 121B; G. L. c. 23B; 760 C.M.R. §§ 49.01, *et. seq*. Consequently, it is both an egregious error of law and a violation of Rivas' constitutional rights to terminate her voucher based on a regulation that does not exist.

A. *The DHCD regulations are unconstitutionally vague.*

The DHCD regulations cannot allude to potentially terminable conduct - it must unequivocally define prohibited conduct *See City of Cambridge v. Phillips*, 415 Mass. 126, 129-30 (1993) (a law is vague if the nature of the wrong is unclear). The applicable regulations provide no meaningful guidance and are therefore unconstitutionally vague. Both criminal and civil laws and regulations are subject to judicial scrutiny for vagueness. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966); *Massachusetts Federation of Teachers, AFT, AFL-CIO v. Board of Educ.*, 436 Mass. 763, 780 (2002); *Custody of a Minor*, 378 Mass. at 717. A vague law violates the Fourteenth Amendment and the Article X of the Declaration of Rights of the Massachusetts Constitution as it deprives life, liberty and property without regard to due process. The dangers of vague laws are apparent:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an Ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.... Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Custody of a Minor, 378 Mass. 712, 716-17 (1979) (internal citations and quotations omitted).

Here, both the regulation (i.e., 760 C.M.R. § 49.03(2)(g)) and the voucher (namely paragraph 3(A)(1)) are impermissibly vague because there is no language or guidance which defines when a guest becomes a household occupant. [6] Even the CHA had difficulty determining how many days Burgos could reside on the premises. First it was suggested that a guest could stay for 14 days:

CARMEN: [7] ... And even if it was two weeks here and there, you know, that's a violation. You have 14 days to have someone live with you.

(TR 12). Then it was thirty days in the aggregate over a calendar year:
STEVE: [8] Exactly. If her mother was staying with her all the time, she would have added her mother.

CARMEN: But if it's two weeks in a month.
STEVE: Two weeks and then two weeks and then two weeks.

CARMEN: In a whole year, that's more than 30 days.

(TR 12-13). Then, the CHA changed its mind for a third time and suggested that Burgos had only 21 days in the aggregate:
CARMEN: She would still be in violation because you have a certain amount of time to be with someone and not be put on the lease.

STEVE: Where does it say that? In the voucher? ... In the regulations? I have the regulations. The regulations don't say anything about that

CARMEN: For the state. It's state MRVP. And I know for Section 8 is 14 days. I believe that for state it's like 21 days. (TR 16-17). It is clear from this exchange that Rivas is allowed to have an overnight guest on the premises. What is not clear is how long the guest can stay before they are considered a household occupant. If the CHA cannot state with certainty, or support its position with any language in either the regulations or the voucher, surely a tenant would be unable to know what the regulations prohibit. [9]

Importantly, Rivas made a good faith effort to comply with what she perceived was her obligations (i.e., she only allowed her mother to live with her for two weeks in a given month). Rivas' good faith conduct illustrates the problems caused by vague regulations. Had the voucher been clearer, Rivas would have adjusted her behavior accordingly, so as not to lose her subsidies. Since the regulations are vague, however, she is essentially trapped into acting in a way which is later determined to be a violation of the voucher's terms. All the DHCD had to do was define how long a guest could stay on the premises as they have done elsewhere in their regulations. If a tenant leases a unit at a city-owned federal project, for example, the DHCD regulations do not allow guests beyond 21 days. (TR 17). *See also* 760 C.M.R. § 6.06(3)(c). The DHCD did not elect to include this as a program requirement for the MRVP program; and it cannot be arbitrarily inferred after the fact. Because both the voucher and the regulations are unconstitutionally vague, the Court must reverse the CHA's decision as a vague law cannot be grounds for termination of an entitlement.

B. *The CHA's definition of household composition is an error of law.*

Even assuming, *arguendo*, that the regulations pass constitutional muster, the CHA's decision must be reversed because their interpretation of “household composition” is an error of law. Where an agency has erroneously construed or interpreted a statute, regulation or contract provision, the Courts are not bound by that erroneous interpretation and will review the matter *de*

novo. *See. e.g. Raytheon v. Director of Division of Employment Security*, 364 Mass. 593 (1974); *Johnson v. Martignetti*, 374 Mass. 784, (1978); *New City Hotel Company v. Alcoholic Beverages Control Commission*, 347 Mass. 539, (1964). Regulatory interpretations fall exclusively within the province of the courts - not an administrative agency. *See. e.g. Cleary v. Cardullo's, Inc*., 347 Mass. 337, 344 (1964) ("the duty of statutory interpretation is for the courts"); *Amherst-Pelham Regional School Committee v. Dep't of Educ*., 376 Mass. 480, 491 ("an administrative . . . interpretation cannot bind the courts").

Because the vague regulation refers to an ambiguous provision in the voucher, the crux of this dispute is contractual in nature. Specifically, this court must resolve the contract ambiguity to decide when there is a change in household income and/or composition that would trigger Rivas' duty to make a report to the CHA. One plausible interpretation is that the household compensation changes when there is a domiciliary change. [10] A broader definition (such as the one ascribed by the CHA) suggests that even a household guest needs to be reported to the CHA. *See Jefferson Ins. Co. v. Holyoke*, 23 Mass.App.Ct. 472, 474-75 (1987) (a contract provision is ambiguous if it is susceptible of multiple meanings). When a plain reading of the provision is unhelpful, the Court must look to the intent of the parties and ascribe a meaning which accords with justice and common sense. *See Stop & Shop, Inc. v. Ganem*, 347 Mass. 697, 701 (1964); *Bowser v. Chalifour*, 334 Mass. 348, 352 (1956); *USM Corp. v. Arthur D. Little Sys., Inc.*, 28 Mass.App.Ct. 108, 116, review denied, 406 Mass. 1104 (1989) (contract to be interpreted "as a whole, in a reasonable and practical way, consistent with its language, background, and purpose"). Lastly, a Court will interpret a contract ambiguity against the drafting party. *See Cambridge Trust Co. v. Hanify & King Professional Corp.*, 430 Mass. 472, 481 (1999). [11]

Utilizing these contract interpretation tools, the CHA's interpretation is erroneous. Since rent is contingent on family income, the sole purpose of this reporting provision is to ensure that a family is making the fair and appropriate contributions towards their housing. *See* 760 C.M.R. § 49.05. It is not meant to be punitive, as there are other provisions in the voucher which address fraud; and it is not meant to keep tabs on guests, or limit the duration of their stay.

Specifically, the intent of this provision is not to curtail a tenant's lawful rights to have guests on the premises. The CHA is well aware that guests are common in public housing settings. [12] Without an express term in the voucher or an administrative regulation to the contrary, Rivas has the unfettered right to guests on the premises. There is a line between guest and household occupant which the CHA arbitrarily set at 21 days in a calendar year. The DHCD and CHA could have limited the duration of guests of their MRVP participants - just as it does in its leases with residents in city-owned federally funded projects (a different program). *See. e.g.*, 760 C.M.R. § 6.06. However, the DHCD does not limit the duration of guests under the MRVP program. We can only assume that a lack of restrictions on guests, both in the voucher and in the administrative regulations, was intentional. Accordingly, this Court should construe the voucher in a way which does not place any sort of durational restriction on guests.

Applying this proper interpretation (i.e., that there are no express limitations on guests), the inquiry should then turn to whether a guest like Burgos would alter the household composition. It is clear both from regulatory definitions and from the conduct of the parties, that Burgos does not alter the household composition. It should be noted again, that neither the voucher (which has no definitions whatsoever) nor the regulations define the term "household composition." The closest we get is a definition of "family" contained in the DHCD's regulations governing the order of selection for state-funded housing. In this context, where the housing authority is attempting to determine an appropriate unit size, the definition of family consists of those who intend to use their house as their "primary residence." 760 C.M.R. § 5.03. "Primary residence" is one's "principal home (domicile) occupied by all members of a household not less than nine months of the year." *Id.* A domicile is defined by Black's Law Dictionary as "a person's true, fixed, principal, and permanent home, to which that person intends to return and remain. . ." *See supra* note 10. Here, Burgos had no intention of permanently residing at the premises. Burgos filed an application to get her own housing and was merely transitioning in the interim. In addition, Burgos was a transient, moving from house to house, which means (1) this was not her domicile; and (2) she did not stay mere in the aggregate for more than nine months. Ironically, the CHA would not consider her a family member if Rivas was trying to obtain a larger unit to accommodate her mother - yet the CHA does consider her a household member to aid in their efforts to terminate Rivas' voucher.

Lastly, the Court should also construe the ambiguous contract provision against the CHA because they drafted the voucher. CHA is in the business of administering public housing programs. Their "experience, technical competence, and specialized knowledge" in public housing puts them in a position where they would be able to identify and anticipate potential issues such as this ambiguity; As discussed above, many of their leases include provisions about guests - the voucher does not Moreover, Rivas is in a significantly weaker bargaining position. When she signed the voucher, she desperately needed housing and had no choice but to seek rental assistance. Had she not signed the voucher, she would not have received the much needed subsidy. Faced with having to refuse the voucher, it is highly probable that Rivas would have signed a provision with more limiting definitions. Again, this did not happen. In interpreting the ambiguous voucher terms, Rivas would certainly be entitled to guests in her home, and Burgos would not be considered a member of the household. The CHA therefore erred in terminating Rivas' voucher based on their self-serving and arbitrary definitions which were imposed after the fact. In construing the voucher ambiguity in favor of Rivas, this Court has no choice but to reverse the CHA's termination.

II. THE CHA'S FAILURE TO COMPLY WITH GRIEVANCE PROCEDURES PRESENTS A SERIOUS AFFRONT TO RIVAS' CONSTITUTIONAL RIGHTS

A myriad of problems exist if an MRVP participant is terminated from the program. These participants "represent some of the most needy and **vulnerable** segments of our population, including low-income families, children, the **elderly**, and the handicapped," *Lowell Housing Authority v. Melendez*, 449 Mass. 34, 40 (2007), and if denied public housing, the participant may not have anywhere else to turn. *Spence v. Gormley*, 387 Mass. 258, 275 (1982). Accordingly, "[a] tenant's interest in her public housing tenancy . . . is a protected interest, entitling her to fair procedures before the government can terminate it." *Id.*; *cf. Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970). With these due process considerations in mind, the DHCD has set forth, in detail, the grievance procedures the CHA is required to undertake before terminating benefits. *See* 760 C.M.R. § 6.08. The CHA has established a grievance procedure which complies with DHCD requirements. In several instances, however, the CHA has deviated from these grievance procedures to Rives' detriment.

A. *The CHA's failure to provide written subsidiary findings of fact in its decision, renders the termination ineffective.*

The CHA's decision is deficient because it does not contain subsidiary factual findings demonstrating that correct legal principles were applied. *See Carter v. Lynn Housing Authority.* 450 Mass. 626, 636 (2008). [13] There are many issues which may arise when an agency fails to discuss subsidiary findings. For one, findings are necessary to show the Court that the agency exercised its adjudicatory discretion. *See. e.g.*, *Maryland Cas. Co. v. Commissioner of Ins.*, 372 Mass. 554, 567 (1977) (a reviewing court "cannot determine whether the [agency] disbelieved those portions of the evidence on which no subsidiary findings were made, or believed them but considered them not determinative of the ultimate issue."); *Commissioner of Revenue v. Lawrence*, 379 Mass. 205, 207 n. 4 (1979) (a hearing officer must "make clearly distinguishable those findings which are based on the credibility of witnesses and those findings which are conclusions based on application of the law to subsidiary findings"); *Carter*, 450 Mass. at 636 ("failure to exercise discretion is itself an abuse of discretion"). Moreover, a lack of findings hinders this Court's ability to determine whether the agency "applied correct principles of law to the facts found by it." *New York Cent. R. Co. v. Department of Public Utilities*, 347 Mass. 586, 593 (1964). As the SJC noted: "[t]he [agency's] right to utilize its 'technical competence and specialized knowledge in the evaluation of the evidence'... may be reflected in the specific findings; it does not make specific findings unnecessary." *Town of Hamilton v. Department of Public Utilities*, 346 Mass. 130, 137 (1963).

This well-settled requirement is consistent with DHCD regulations. In terminating a MVRP voucher, the DHCD regulations require "a written decision . . . describing the factual situation and ordering whatever relief, if any, that shall be appropriate under the circumstances and under applicable laws, regulations, rules and/or policies." 760 C.M.R. § 6.08(4)(g) (emphasis supplied). [14] Since a housing authority that does not support its decision with findings of fact essentially fails to comply with the grievance procedure, remand to the agency for further consideration is required. *See, e.g.*, *Medi-Cab of Massachusetts Bay. Inc. v. Rate Setting Comm'n*, 401 Mass. 357, 371, (1987).

Courts are particularly wary of decisions supported by a vague reference which might be construed as a finding of fact. In *Leen v. Board of Assessors of Boston*, for example, the administrative record consisted of over 1000 pages of transcript and many detailed documents, yet the agency ruled against Leen based on a vague reference to "all the evidence." 345 Mass. 494, 501 (1963). The Supreme Judicial Court explained:

> enshrouding its finding with a vague reference to "all the evidence," [an agency] has disposed of that issue in such a way that both the [grievant] and ourselves in attempting to exercise our function of appellate review under G.L. c. 30A . . . are left without any guide to its reasons. There is a duty to make adequate subsidiary findings, a duty which is not performed by making one almost meaningless statement.

Id. at 501-2.

Because the CHA's decision is devoid of subsidiary findings of fact, Rivas has been denied a full and fair opportunity to grieve her termination. The CHA hastily delivered a decision in a manner markedly similar to the decision of the agency in the *Leen* case. Here, the administrative record is not as voluminous, but the transcript includes several factual and legal disputes which were brought to the attention of the CHA's grievance panel. After the hearing, these questions were ignored because the CHA effectively rubber-stamped a termination based on a "failure to report changes in family composition and in family's income." (RA 3). The sole "finding of fact" in support of this legal conclusion was "[o]verwhelming evidence . . . presented at the hearing, as well as testimony and documentation by CHA staff from both the Leased Housing Department and Tenant Selection Department." *Id.* This vague finding of fact - if it can be characterized as such - like the findings in the *Leen* case, does not provide any insight as to whether the CHA applied the facts to the correct legal principles; it ignores the CHA's duty to discuss subsidiary findings of fact in support of its decision; and it completely fails to comply with DHCD regulations requiring a description of the factual situation.

B. ***The grievance procedures were marred with procedural irregularities.***

There were numerous irregularities in the grievance procedure each of which deprived Rivas of her constitutional right to procedural due process under the Fourteenth Amendment and Article X of the Declaration of Rights of the Massachusetts Constitution. Rivas is cognizant of the fact that the testimony in support of these procedural irregularities will only be allowed by leave of Court. *See* G. L. c. 30A § 14(5). On Monday, December 28, 2009, Rivas conducted two depositions of CHA staff members concerning these procedural irregularities. As a result of the testimony elicited during these depositions, Rivas has sought leave of Court to supplement the record. Since this action is subject to an expedited tracking order, however, this instant motion for judgment on the pleadings was required to be filed before Rivas had an opportunity to present a motion to supplement the record. Out of fairness to the CHA, the allegations of procedural irregularities will not be recounted in this memorandum. To the extent this motion to supplement the record is allowed, Rivas reserves her right to either amend this memorandum, or to refer the Court to the allegations of procedural irregularities which are fully briefed in the motion to supplement the record. These irregularities require the Court to reverse the CHA's decision to terminate Rivas' voucher.

III. THE CHA ERRED IN DISREGARDING POTENTIALLY DISPOSITIVE EVIDENCE BASED ON AN ERRONEOUS UNDERSTANDING OF THE PURPOSE OF A NOTARIZATION

Given the grievous errors of law and constitutional shortcomings of the CHA's decision which are discussed above, this Court already has sufficient grounds to reverse the agency decision. However, one evidentiary matter which should be discussed is the undue weight the CHA gave to a notarized letter which it erroneously believed to be sworn testimony. There are two conflicting letters which Rivas submitted as part of Burgos' housing application. Rivas first filed an un-notarized letter dated June 3, 2009 which indicated that Burgos only stayed in her house in intervals of approximately two weeks. (RA 14). The CHA informed Burgos that the first letter was insufficient and demanded a second letter. (TR 14). To aid Burgos, the CHA provided a template for an acceptable letter, which did not include details of her rotating living arrangements. (RA 17). Because Burgos was given

a template as a guide, she had no reason to believe that all Rivas had to do was notarize the first letter. As such, Rivas copied the template verbatim and had it notarized as requested. (RA 19). It was submitted to the CHA just thirteen days after the initial letter. In seeking termination, the CHA completely disregarded the first letter in favor of the second letter because they assumed a notarization was an oath. This was discussed at the grievance hearing:

STEVE: The notarization, a notarized letter means this person signed it. That's what it means.

JIM: [15] Exactly. That's right It's testimony. It's testimony.

(TR 21). This conversation continued at the hearing without a meaningful resolution. (TR 21-22).

Indeed a notarization can come in many forms. It could be an affirmation, oath or jurat which requires some form of oath to tell the truth; or it could be a signature witnessing or acknowledgement which does not require an oath. *See* Rev. Exec. Order No. 445 (04-04) at § 5 (2004). [16] In this instance, no oath or affirmation was taken by the notary, and the document is not endorsed with a jurat certificate. (RA 19). It was an error of law for the CHA to disregard potentially dispositive evidence solely on the basis that it was not notarized. Consequently, the CHA's misunderstanding of the notarization laws is grounds for reversal upon this Court's *de novo* review of errors of law. *See Raytheon*, 364 Mass. 593.

CONCLUSION

The decision of the CHA does not pass judicial scrutiny because it is the product of a process riddled with errors of law in violation of the regulations and Rivas' right to due process of law under the federal and state constitutions. For all the foregoing reasons, this Court must reverse the decision to terminate Rivas' MRVP voucher *nunc pro tunc* to November 1, 2009.

Respectfully submitted,

Elizabeth Rivas,

By her attorneys,

<<signature>>

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Dated: January 4, 2010

Footnotes

1 References to the transcript will be cited as TR(page #) and references to the record will be cited as RA(page #).

2 This provision indicates that the CHA could enter into a repayment plan in the event of underpayment, rather than seeking termination. Assuming, *arguendo*, that Burgos should have been added to the lease, the underpayment of rent is only $2,639.73. (TR 4). It is inequitable to seek termination, when there are other fair, less harsh solutions.

3 There was overwhelming undisputed evidence, including affidavits from Burgos, Rivas, Rivas' two sisters, Rivas' landlord and a neighbor, clearly indicating that Burgos was not staying exclusively with Rivas. (TR 11; RA 28, 29, 30 and 32).

4 In hindsight, this six month to a year time estimation made by a secretary at the CHA would likely be accurate if Burgos was not **elderly** and eligible for a priority housing placement.

5 The CHA's case does not reference this letter, or the two letters from Rivas' sisters. (TR 2-4; RA 14-16).

6 760 C.M.R. § 49.03(2)(g) reads: "To be otherwise eligible for the MRVP, an applicant or Participant must not . . . [h]ave failed to comply with the terms of an MRVP Voucher."

7 Carmen Tones, the CHA's representative for the MRVP Program.

8 Stephen J. Callahan, Esq., counsel for Rivas.

9 The DHCD regulation is an example of double-level vagueness. It vaguely prohibits conduct that is prohibited in the voucher, which is vague itself.

10 Domicile is defined by Black's Law Dictionary (8th ed.) as "the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." In this instance, Burgos was homeless and waiting for the CHA to approve her for, and assign her to a home. Burgos' temporary sojourn at Rivas' house, therefore, would not make her a household occupant.

11 There are many circumstances where the ambiguity would be resolved in favor of the non-drafting party, especially where the parties are not in equal bargaining positions or lack comparable technical skills or knowledge. *See. e.g. id.*; *Benalcazar v. Goldsmith*, 400 mass. 111, 114 (1987) (contingency fee ambiguity interpreted against the drafting attorney where the non-drafting party did not have specialized legal training); *Merrimack Valley Nat Bank v. Baird*, 372 Mass. 721, 724 (1977) ("[a]s a general rule, a writing is construed against the author of the doubtful language if the circumstances surrounding its use and the ordinary meaning of the words do not indicate the intended meaning of the language").

12 The prevalence of household guests prompted regulations aimed at holding tenants responsible for their guest's actions. *See* 760 C.M.R. § 6.06(4)(p); 24 C.F.R. § 982.404(b)(iii).

13 The *Carter* case is a recent SJC decision which requires housing authorities to support a decision to terminate rental subsidies with written findings of fact *Id.* at 636 ("the [Lynn Housing Authority's] suggestion, then, that there is no requirement that there be 'any' factual determination in the written decision is simply not correct.") This accords with the well-settled rule that administrative agencies are uniformly required to include written subsidiary findings of fact in their decisions. *See. e.g.*, *Lycurgus v. Director of Div. of Employment Sec.*, 391 Mass. 623, 626-27 (1984); *Smith v. Director of Division of Employment Sec.*, 376 Mass. 563, 565-66 (1978); *Katz v. Massachusetts Comm'n Against Discrimination*, 365 Mass. 357, 363 (1974); *Leen v. Board of Assessors of Boston*, 345 Mass. 494, (1963); *Packard Mills, Inc. v. State Tax Commission*, 345 Mass. 718,723 (1963); *Bay State Harness Horse Racing & Breeding Ass'n, Inc. v. State Racing Comm'n*, 342 Mass. 694, 701 (1961); *Messersmith's Case*, 340 Mass. 117, 120 (1959).

14 The CHA is well aware of their obligation to provide detailed findings of fact and conclusions of law in accordance with DHCD regulations. *Huezo v. Chelsea Housing Authority*, No. SUCV2007-4148-C, 2008 WL 4975328 (Mass. Super. Sept 11, 2008) (Lauriat, J.). In *Huezo*, the Court could not sanction the CHA's failure to show it considered mitigating circumstances in its decision, where such a showing was required by 760 C.M.R. 5.08(2). *Id.* at *7, Although the grievance procedures in the instant case differ slightly, the CHA is well aware of their obligations to render decisions which fully comply with applicable grievance regulations.

15 Jim McNichols, a member of the grievance panel.

16 If the notarization was in the form of an oath, jurat or affirmation, the notary is required to include a jurat certificate in substantially the following form: On this ___ day of ___, 20 ___, before me, the undersigned notary public, personally appeared ___ (name of document signer), proved to me through satisfactory evidence of identification, which were ___, to be the person who signed the preceding or attached document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of (his) (her) knowledge and belief. ___ (official signature and seal of notary). *Id.*